(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUL 15 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a special education resource teacher with The petitioner teaches at The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on April 20, 2012. In an accompanying introductory statement, counsel stated that the "petition for waiver of the labor certification is premised on [the petitioner's] Master's Degree in Special Education [and] two (2) Bachelor's degrees . . . which are from an accredited institution of higher education in the United States." Counsel evidently meant to say that the degrees are equivalent to degrees from institutions in the United States, because, as counsel elsewhere acknowledged, the petitioner's degrees are actually from universities in the Philippines. The degrees are necessary for the underlying classification (member of the professions

holding an advanced degree). That classification includes a job offer requirement, so the petitioner's degrees cannot, on their face, demonstrate eligibility for a waiver of that same requirement.

Counsel asserted that the petitioner "was nominated for the 'Teacher of the Year Award.'" The record contains background information about the award at both the county and state levels, but there is no claim and no evidence that the petitioner received the award. At best, the nomination constitutes recognition from because the principal of that school signed the nomination letter. The petitioner's only other claimed recognition is a "Certificate of Achievement" she received "during American Education Week 2006" from the county executive of The record does not reveal how many other teachers received similar certificates at the time.

Counsel also noted that the petitioner has worked in her field "for more than twenty five (25) years now." Degrees, experience, and recognition can form elements of a successful claim of exceptional ability in the sciences, the arts, or business. *See* 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B), and (F). Exceptional ability, in turn, is not grounds for the waiver. As noted previously, section 203(b)(2)(A) of the Act plainly states that an alien of exceptional ability, like a member of the professions holding an advanced degree, is presumptively subject to the job offer requirement unless he or she makes an affirmative showing of eligibility for the national interest waiver.

Much of the initial submission consisted of letters from administrators, teachers, and students. These witnesses attested to the petitioner's skills as a teacher and (in the Philippines) as an administrator. The petitioner submitted two versions of a letter from mathematics chairperson at . One version of the letter (a photocopy in the record) supported the petitioner's nomination for teacher of the year. In the other version, stated that the petitioner assisted "a student who was failing everything," and that the student later "passed both of the Maryland State Assessments." stated that "others . . . have benefited from [the petitioner's] work," but did not show a wider impact. Instead, she stated: "I respectfully ask that you consider the impact that [the petitioner's] loss would be to our school and our staff." Other witnesses offered similar statements to the effect that the petitioner's greatest impact has been within her particular school. The letters portray the petitioner as a valued member of the

The petitioner submitted charts showing that, out of 14 special education students, 10 met the 2011 proficiency goal in mathematics and 11 met the goal in reading. Other categories of students showed proficiency rates of 89% or higher.

The director issued a request for evidence on September 21, 2012, instructing the petitioner to submit evidence of impact on the field as a whole, as opposed to at schools where she has worked. In response, counsel protested that, using a "strict implementation of *In the Matter of New York Department of Transportation*, the USCIS-Texas Service Center has denied a considerable number of cases of our client-teachers' National Interest Waiver self petitions." Counsel acknowledged that the director is "required by law" to follow *NYSDOT*, but counsel asserted "the Service has legal and

factual bases to approve Highly Qualified Teachers' National Interest Waiver applications without offending the principles enunciated in the *Matter of New York Department of Transportation*."

Counsel asserted that section 203(b)(2)(B)(i) of the Act does not contain clear guidance on eligibility for the waiver, and claimed that Congress subsequently filled that gap with the passage of the No Child Left Behind Act (NCLBA). Counsel noted that Congress passed the NCLBA three years after the issuance of NYSDOT as a precedent decision, and claimed that "[t]he obscurity in the law that NYSDOT sought to address has been clarified," because "Congress has spelled out the national interest with respect to public elementary and secondary school education" through such legislation. Counsel, however, identified no specific legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

Counsel claimed that the benefit from the petitioner's work is national in scope because of "the national priority of closing the achievement gaps between minority and nonminority students, and between disadvantaged and more advantaged children." The text of *NYSDOT* differentiates between an occupation of national importance and the impact of one worker within that occupation, citing, as an example, a profession that closely mirrors the facts of the present proceeding: "while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act." *Id.* at 217 n.3.

Counsel asserted that the petitioner "is an effective teacher in raising student achievement in STEM" (science, technology, engineering, and mathematics), but the record does not support this claim or even indicate that the petitioner specializes in teaching those subjects.

Counsel stated that "the National Educational Interests . . . would be adversely affected if a labor certification were required," because the Teach for America program has produced disappointing results. This assertion incorrectly presumes that the only two available options are to continue relying on the flawed Teach for America program, or to grant the national interest waiver. In repeatedly citing the NCLBA in support of the waiver claim, counsel did not cite any evidence to show that the NCLBA had produced better results than Teach for America.

Counsel cited a study showing that special education teachers have a higher turnover rate than teachers in other specialties. A greater number of vacancies, however, would tend to facilitate rather than hinder the approval of labor certifications for such teachers. Indeed, the petitioner herself already obtained an approved labor certification.

Part 4, line 6 of the Form I-140 petition asked: "Has any immigrant visa petition ever been filed by or on behalf of this person?" The petitioner answered "No." USCIS records show that this answer was not correct. [redacted] applied for a labor certification on April 30, 2008. Following its approval on July 17, 2008, [redacted] filed its own Form I-140 petition, with receipt number [redacted] on October 1, 2008, seeking to classify the beneficiary as a member of the professions under section 203(b)(3)(A)(ii). The director approved the petition on February 13, 2009, more than three years

before the petitioner filed the present petition on her own behalf. Hypothetical reasons why the petitioner might not be able to secure a labor certification fail, because the petitioner already has an approved labor certification (and, through it, an approved immigrant petition).

Counsel stated that another [redacted]eacher received a national interest waiver, and asked that the present petition "be treated in the same light." Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). While AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished service center decisions are not similarly binding. *See* 8 C.F.R. § 103.3(c). Furthermore, counsel provided no evidence to establish that the facts of the instant petition are similar to those in the unpublished decision. Without such evidence, the assertion that both cases merit the same outcome is unwarranted. The only stated similarity is that the beneficiary of the approved petition is "also a teacher in [redacted]"

The director denied the petition on January 23, 2013. The director stated that the petitioner's occupation has substantial intrinsic merit, but found that the petitioner had not met the other two prongs of the *NYSDOT* national interest test. The director stated that the NCLBA does not negate the statutory job offer requirement at section 203(b)(2)(A) of the Act.

On appeal, counsel states: "on the issue of applicability of the 'Matter of New York State Dept. of Transportation[']] to the NIW petitions by 'Highly Qualified Teachers,' USCIS erred in giving insufficient weight to the national educational interests enunciated in the No Child Left Behind Act of 2001 as the guiding principle rather than the precedent case which involved an engineer."

While *NYSDOT* "involved an engineer," the three-pronged national interest test is, by design, broadly applicable. The precedent decision is binding across the immigrant classification, not limited to engineers. Counsel has claimed that "the issue of applicability" of *NYSDOT* is open to debate, but as a published precedent, *NYSDOT* is binding on all USCIS employees. *See* 8 C.F.R. § 103.3(c).

Counsel states that *NYSDOT* fails to take into account "subsequent legislations intended to provide guiding principles to implement Immigration Act of 1990 (IMMACT 90) in favor of Highly Qualified Teachers." Counsel does not identify any legislation that specifically grants the waiver to such teachers, but in context, counsel appears to refer to the NCLBA. That legislation, however, did not amend section 203(b)(2) of the Act or otherwise mention the national interest waiver. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95, 113 Stat. 1312 (1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not established that the NCLBA indirectly implies a similar legislative change. Counsel claims: "Congress legislated NCLB to serve as guidance to USCIS in

granting legal residence to 'Highly Qualified Teachers,'" but cites nothing from the statute or from any secondary source to support this claim. The NCLBA is not an immigration statute.

Counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(Emphasis added.) Counsel, above, highlighted the phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the statute that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the No Child Left Behind Act, separately or in combination, create or imply any blanket waiver for teachers.

Counsel stated that the director's "decision found [the petitioner's] achievements as insufficient but USCIS did not present even one comparative candidate having at least the equivalent accomplishment as that of [the petitioner] to support its determination." In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The director bears no burden of proof in this proceeding, and need not produce a "comparative candidate" to justify a denial decision. There is no presumption of eligibility that the director must rebut.

Counsel contends that factors such as "the 'Privacy Act' protecting private individuals" make it "impossible" to compare the petitioner with other qualified workers. Counsel's contention rests on the incorrect assumption that the *NYSDOT* guidelines amount to little more than an item-by-item comparison of an alien's credentials with those of qualified United States workers. The key provision in *NYSDOT* is that the petitioner must establish a record of influence on the field as a whole. *Id.* at 219, n.6. To do so does not require an invasive review or comparison of other teachers' credentials.

Counsel quotes remarks made by then-President George H.W. Bush when he signed IMMACT 90, which created the national interest waiver: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas." Counsel interprets this passage to mean that Congress created the national interest

waiver for educators. IMMACT 90, however, was not restricted to the creation of the waiver; it restructured the immigration classification system, and that very legislation subjected members of the professions, including "scientists and engineers and educators," to the job offer requirement. The national importance of "education" as a concept, or "educators" as a class, does not lend national scope to the work of a single kindergarten teacher.

Counsel maintains that the labor certification process impedes the employment of "Highly Qualified Teachers," but counsel does not explain how this is so. Section 9101(23) of the NCLBA defines the term "Highly Qualified Teacher." Briefly, by the statutory definition, a "Highly Qualified" elementary school teacher:

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- has demonstrated, by passing a rigorous State test, subject knowledge and teaching skills in reading, writing, mathematics, and other areas of the basic elementary school curriculum, or (in the case of experienced teachers not "new to the profession") demonstrates competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation.

Section 9101(23)(A)(ii) of the NCLBA further indicates that a teacher is not "Highly Qualified" if he or she has "had certification or licensure requirements waived on an emergency, temporary, or provisional basis." Counsel does not explain how the above requirements are incompatible with the existing labor certification process. The petitioner's own approved labor certification stated that an applicant for her position must hold at least a bachelor's degree in education, and "[m]ust have or be immediately eligible for Maryland Teaching Certificate," requirements that are fully compatible with the statutory definition of a "Highly Qualified Teacher."

By statute, engaging in a profession (such as teaching) does not presumptively entitle such professionals to the national interest waiver. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. Furthermore, the petitioner has provided conflicting information that casts doubt on fundamental claims and indicates that she has left the occupation on which the waiver request rests. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The AAO will dismiss the appeal for the above stated reasons. As stated previously, in visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 128. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.